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Supreme Court, U.S.
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No. ....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

GOLETA WATER DISTRICT, EDWARD G. MASCHKE, PATRICIAL SHEWCZYK, DONNA O. HONE, DONALD W. WEAVER, JACK D. WALKER, LLOYD C. FOWLER,
Petitioners,
VS.
A. FRANK MCMILLAN and GLADYS BOTTROFF MCMILLAN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* [1985], ____ U.S. ____; 105 S.Ct. 3108, requires a determination that the statute of limitations does not begin to run until a "final decision" is made by the public entity, even though the law and the facts make the request for a final decision futile because the outcome is definite and cetain against the applicant.

2. Whether a substantive due process analysis of the facts of this case supports the decision of the Ninth Circuit that the district court failed to decide the pivotal and crucial question of whether the Respondents were potential water users and therefore barred by *Hollister Park Investment Co. v. Goleta County Water District* [1978], 82 Cal.App.3d 290; 147 Cal.Rptr. 91.

3. Whether the Ninth Circuit erred in concluding that the district court opted to not abstain on the substantive due process question; and if the Ninth Circuit concludes that abstention is appropriate in this case on the substantive due process issue, is not that decision irreconcilable with *Bank of America N.T. & S.A. v. Summerland County Water District* [1985], 767 F.2d 544.

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OPINIONS BELOW[1]

The United States Court of Appeals for the Ninth Circuit issued an opinion in this case, which has been reported at 792 F.2d 1453. A copy of this Opinion appears in Appendix A to this Petition (see pages 1-14). It

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[1]The caption of the case in this Court contains the names of all parties. Rule 21.1(b), Rules of the Supreme Court.

reversed in part and affirmed in part a district court decision.

The same Court denied a Petition for Rehearing, a copy of which is at Appendix B.

The Memorandum and Order of the United States District Court, Central District of California, which the above opinion affirmed in part and reversed in part is at Appendix C.

Prior to the above proceedings the United States Court of Appeals, Ninth Circuit, filed a Memorandum on June 19, 1984, reversing a district court decision. A copy of the decision is at Appendix D.

The Order of the District Court, filed June 21, 1983, which was reversed by the above decision is at Appendix E.

The Ordinance of the Goleta Water District adopted December 31, 1972, is at Appendix F.

The Initiative adopted by the voters of the Goleta Water District in May 1973 is at Appendix G.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 30, 1986; a Petition for Rehearing was denied on September 10, 1986. a Petition for Certiorari is timely if filed within ninety days of the date Rehearing is denied. (Rule 20.4, Rules of the Supreme Court.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS

The Constitutional and statutory provisions considered in this case are:

1. Inverse Condemnation

42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

2. Equal Protection and Substantive Due Process

Amendment V to U. S. Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV to U. S. Constitution:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

I

STATEMENT OF THE CASE

There have been two appeals to the United States Court of Appeals for the Ninth District. In each case the appeal arose from consecutive dismissals of Respondent's complaint.

Respondents herein filed their initial complaint for inverse condemnation on May 2, 1983, pursuant to 42 U.S.C. Section 1983. In addition, they urged that Petitioners had violated their equal protection and substantive due process rights. The Petitioners sought dismissal for failure to allege jurisdiction and failure to state a claim upon which relief may be granted. The district court dismissed the action on June 21, 1983. (See Appendix E.) Respondents appealed.

The Court of Appeals reversed and authorized leave to amend. (Appendix D) Respondents amended their complaint.

Petitioners then moved for summary judgment. The district court wrote an extensive opinion and granted

judgment to again dismiss. (Appendix C) The Court of Appeals reversed in part and affirmed in part. (Appendix A) A motion for rehearing was denied. (Appendix B)

II

THE FACTS

In 1966, the Respondents acquired real property located within the boundaries of the Goleta Water District. At that time, a residence on the property was supplied with water through a meter installed by the District. In 1967 the Respondents began to develop the property with the intention of subdividing the lot and developing housing units. Although the District had been providing water service to the previous owner of the property since 1961, "all water usage ceased soon after the McMillans took over the land, apparently because of their construction plans." (Appendix C, p. 2)

In 1967 the water service was officially disconnected. The McMillans were thereby relieved of any obligation to pay the monthly basic meter charge that is assessed even if no water is used. In 1968 the meter was replaced; the new one remained intact until 1983, when the Water District ordered it removed and took the McMillans off their "active status" billing accounts. (Appendix C, p. 3.)

With the exception of a leak in 1973 no water has been used on the property since the date when service first stopped. The McMillans could have had their water service restored any time before 1972. They chose not to do so. (Appendix C, p. 3)

On December 21, 1972, the Water District adopted an ordinance (Appendix F) imposing a moratorium on new water connections because of an imbalance between the District's steady supplies and existing demands. Under

that ordinance water service would not be renewed for any existing facility unless during the previous five years a significant quantity of water had been used for a *bona fide* purpose. In May of 1973 the District's voters adopted by referendum a "Responsible Water Policy Ordinance" also prohibiting new water connections during a time of water shortage. (Appendix G)

The District Court found with respect to the summary judgment motion that:

> "Although the McMillans did not make any written application for the restoration of water service until 1982, the record clearly shows that soon after the moratorium went into effect plaintiffs became aware that the service would not be restored to their property because of the moratorium. Mr. McMillan admits in his deposition that 'I do recall trying (the faucet) several times and there was no water available after the '72 moratorium . . . I did try at different times to turn the meter on and evidently the water was shut off according to the records.' Plaintiffs allege they made repeated verbal requests after the moratorium to have their water service renewed. Mr. McMillan also avers that beginning in 1974, he made regular visits to the water board to inquire about the status of the moratorium and the possibility of its being lifted. Plaintiffs contend they postponed any additional action, such as applying for an exception, because they believed any such request would be futile, and were deceived by the District's representatives into thinking that the Ordinance would be repealed at any time — once the water emergency had ended." (Appendix C, p. 4)

In any event, on September 15, 1982, the McMillans formally applied to the Water District for renewal of

water service. In their application they said that "discontinuance of service was due to demolition of an old duplex"; that they had "financial reverses in the 60's" and could not complete building the duplex; that had they known there would be a water moratorium they would not have had the services disconnected; that they want to rebuild; that a sale was pending for the property provided they could get water. (Appendix C, p. 4)

The Water District denied the request on October 7, 1982. The minutes of that meeting reveal that the basis for denial was that the request would constitute a new use not permissible under the ordinance. (Appendix C, p. 4)

The McMillans then filed suit alleging inverse condemnation and violation of their constitutional rights under the State and Federal Constitutions.

III

FIRST DECISION OF THE DISTRICT COURT

Soon after the initial complaint was filed the Water District moved to dismiss. The motion was granted on the basis that the complaint failed to state a claim upon which relief may be granted. (Appendix E)

IV

FIRST DECISION OF NINTH CIRCUIT COURT OF APPEALS

In reversing the case the first time, the Ninth Circuit assumed that the district court interpreted the complaint to allege only that the McMillans were *potential* users of water when service was denied.

> "Under California law, while an actual user of water apparently does have a property right that is taken if

> water service is discontinued, a potential user of water has no such property right . . ." (Appendix D, p. 3)

The Ninth Circuit said the McMillans asserted at oral argument that they were actual, or at least more than mere "potential," users of water and should be granted leave to amend. Moreover, the Ninth Circuit said that after the complaint is amended:

> ". . . the district court should explicitly consider whether the statute of limitations bars suit for discontinuation of actual or 'constructive' use of water service. Also, if necessary, it should consider whether California law recognizes a property right to water service for constructive users and whether the District should abstain from deciding this case under the doctrine established in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 [1941]" (Appendix D, p. 3 and 4).

The McMillans amended their complaint on August 28, 1984. *First*, they alleged that the Water District's action amounted to inverse condemnation of their property and a taking under the fifth amendment. They contend they were *actual* users of water at the time the moratorium began and the District refused to restore water service, rendering the property valueless. *Second*, they claimed a violation of their substantive due process rights, contending that the moratorium was a "sham." *Third*, they claimed that their rights to equal protection have been violated in that other applicants have been granted hardship exceptions.

The Water District conducted discovery and filed a motion for summary judgment.

V

SECOND DECISION OF THE DISTRICT COURT

In a lengthy decision the district court granted the request. (See Appendix C.) In substance the court, in following the guidelines of the Ninth Circuit, considered the issues urged in their opinion on remand. The district court found that the McMillans' claim for inverse condemnation was barred by the statute of limitations (Appendix C, p. 6-14); that their substantive due process claim should not be heard since they could pursue the remedies that they might have through mandamus (California Code of Civil Procedure, Section 1085) and to the extent they sought to have the Water District search out new water sources or justify the moratorium, the Court would abstain (Appendix C, p. 16); that the equal protection challenge was dismissed because they have not shown that others were granted hardship exceptions and that the McMillans had been excluded. (Appendix C, p. 16-17)

VI

SECOND DECISION OF NINTH CIRCUIT COURT OF APPEALS

A. Equal Protection

The Court of Appeals said the McMillans had set forth no evidence showing that the Water District's motivation was other than a rational interest in upholding the moratorium and therefore there was no violation of their equal protection rights. No writ is sought with respect to that issue.

B. The Statute of Limitations

The Ninth Circuit reversed on this issue. The Court of Appeals said that the determination issue is whether the cause of action accrued in or before 1974, or on November

12, 1982. The district court determined that the McMillans' claim arose in 1973 or 1974 when they knew or should have known that their rights to continued water service had been interrupted on other than a temporary basis, and that, therefore, the McMillans were barred by the statute of limitations in 1978 or 1979. (The trial court decided the issue prior to *Wilson v. Garcia* [1985], 105 S.Ct. 1938, which held that the proper statute of limitations is one year. The trial court borrowed the five-year statute under California Code of Civil Procedure Section 336.)

The district court relied on *Mosesian v. County of Fresno* [1972], (28 Cal.App.3d 493, 104 Cal.Rptr. 655) which held that an inverse condemnation claim accrues when the taking is objectively complete, not when the claimant is subjectively convinced that the taking is permanent rather than temporary.

The Ninth Circuit reversed, relying instead on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* [1985], ____ U.S. ____, 105 S.Ct. 3108. The Court of Appeals read that case to require reversal on the theory that it was not until the McMillans made their request for a hearing on November 12, 1982, that there was a final decision regarding the application of the regulations to the property at issue.

C. Substantive Due Process

The decision by the Ninth Circuit with respect to reversing on this issue is the Court's application of *Hollister Park Investment Co. v. Goleta County Water District* [1978], 82 Cal.App.3d 290; 147 Cal.Rptr. 91. That decision was based on the premise that a *potential water user* does not possess an absolute right to be treated in the same manner as existing water consumers within a

water district. Everyone agrees that *Hollister Park* stands for the proposition that Goleta's water moratorium is constitutional *as applied* to *potential users of water.* The Court of Appeals then said:

> "Yet here the district court did not determine whether the McMillans were actual water users, as they contended, or whether they were merely potential users. *Hollister* is applicable only once this determination is made. Therefore the district court's dismissal of the McMillans' substantive due process claim in light of *Hollister* was erroneous, and is reversed and remanded for the district court to determine whether the McMillans were actual or potential users. If it finds that they were only potential users, their substantive due process claim must fall in light of *Hollister.*" (Appendix A, p. 8-9)

The Court of Appeals went on to point out that if they were actual users, the district court will be faced with the issue, left undecided by both the United States Supreme Court and the Ninth Circuit, whether property owners can recover damages for inverse condemnation. (See *San Diego Gas and Electric Co. v. City of San Diego* [1981], 450 U.S. 621, 636-61; *Agins v. City of Tiburon* [1980], 24 Cal.3d 266; *Martino v. Santa Clara Valley Water Districts* [1983], 703 F.2d 1141, 1148 (9th Cir.), *cert. denied,* 464 U.S. 847.

D. Abstention

The Ninth Circuit refused to consider that this case met the standards for abstention under *Railroad Commission of Texas v. Pullman Co.* [1941], 312 U.S. 496. The decision was made even though the case before the bar appears to be identical with *Bank of America, National Trust and Savings Association v. Summerland County*

Water District [1985], 767 F.2d 544, 546 (9th Cir.) Moreover, the district court in the case at bar specifically pointed out that if the remedy Respondents seek is an order requiring the Water District to search out new water sources or otherwise justify the continuation of the water moratorium, then the court would abstain. That is the remedy the Respondents appear to seek. In light of the foregoing record, the Ninth Circuit rejected the abstention concept and said:

> "If the California State Courts would conclude that *Agins* applies solely to zoning ordinances, and not to the water moratorium ordinance, and if the McMillans recover just compensation via an inverse condemnation action, then the need for constitutional adjudication by the Federal Courts would be obviated.
>
> However, a Federal Court need not abstain merely because there exists the abstract possibility that state courts might render adjudication of the federal question unnecessary. [citation] Consequently, the district court did not abuse its discretion by failing to abstain." (Appendix A, p. 11-12)

VII

REASONS FOR GRANTING THE WRIT

The following reasons are set forth why this Court should grant our request for Writ of Certiorari. We have attempted to comply with the court's directive pursuant to Rule 21.1(j) and Rule 17 setting forth the "special and important reasons" why a review should be granted.

POINT ONE

THE LOGICAL EXTENSION OF THE NINTH CIRCUIT'S OPINION IS THAT THERE IS NO VIABLE STATUTE OF LIMITATIONS

When a federal court of appeals has decided an important question of federal law in a way that conflicts with applicable decisions of the Supreme Court, there exists a very real reasons for review. (Rule 17.1(c))

Consider the fact that there are thousands of people in the Goleta Water District who want water but cannot get it because of the moratorium specifically endorsed by the voters in May 1973 when they passed the initiative entitled "The Responsible Water Policy Ordinance (Appendix F). The opinion by the Ninth Circuit in this case concludes that the statute of limitations does not *begin* to run until the McMillans seek administrative relief from the application of the Ordinance to their property. This, the Court believes, is the mandate of the *Williamson* case, *supra*. The logical extension of that thinking as applied in this case renders any viable and realistic statute of limitations meaningless. Indeed, for all practical purposes, the Water District literally must maintain its records and documents forever if it is to respond to an inverse condemnation case filed whenever a landowner is so inclined, even though decades have passed. The use of witnesses is obviated. A landowner could, by inaction, keep the statute open indefinitely.

Such a result is in direct contrast to what this Court said in *Wilson v. Garcia* [1985], ____ U.S. ____, 105 S.Ct. 1938, that in 42 U.S.C. 1983 cases:

> "A federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws.' *Adams v. Woods* [1805], 2 Crunch 336, 341;

> 2 L.Ed.2d 297. Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost. In compelling circumstances, even wrongdoers are entitled to assume their sins may be forgotten." (At p. 1944)

As we have previously pointed out in our briefs on appeal and for rehearing, the Respondents urged that under District Ordinance 72-2 (Appendix E) the Water District had the authority to issue new water connections in cases of "hardship." They argue that since Respondents did not apply for a hardship exemption until 1982, the issue did not become "ripe" until then, and that *Williamson* applies. We strenuously reject that analysis.

As pointed out by the district court, the statute begins to run once the interference with the Respondents' property right is permanent in an objective sense. As early as 1973 or 1974 the Respondents knew or should have known that their right to continued water service had been interrupted by the District on other than a temporary basis, and they regarded any request to have water service restored as futile.

Moreover, the initiative ordinance adopted by the voters in 1973 (Appendix F) subsequent to Ordinance 72-2, *does not contain any hardship, variance* or *exemption procedure* as did the earlier-enacted Ordinance 72-2.

Hollister Park, supra expressly recognized the distinction between the two ordinances, characterizing Ordinance 72-2 as an interim measure superseded by the voter-adopted initiative. (82 Cal.App.3d 290, at 294; 147 Cal.Rptr. at 93). The Water District had no option to give any variance or to grant any request.

In light of the foregoing analysis, the only way to consistently apply the law to the facts is to conclude that the case was "ripe" in 1973. To seek a hardship exemption nine years later, which was futile as a matter of law *and* as acknowledged to be futile as a practical matter by the Respondents, is an entirely inappropriate springboard from which to seek judicial relief.

Such an application of the *Williamson* case, *supra,* is irreconcilable to the rule set forth in *Wilson v. Garcia, supra.* More important, if *Williamson* is correctly applied in this case, virtually no statute of limitations will ever begin to run in almost any case. We recognize that the Goleta Water District surely and certainly had "reached a final decision regarding the application" of the ordinance to the McMillan property long before 1982. Once a request becomes futile in the asking, surely the court will not require that it be asked anyway.

There has been at least one case which has distinguished *Williamson.* In *Furey v. City of Sacramento,* 780 F.2d 1448, the property owner claimed that his property was taken in violation of the United States Constitution when his land was assessed to pay for the construction of a sewer system and the public entity prevented him from developing his land and making use of the sewer. After oral argument, the parties were asked to brief the *Williamson* case as to the issue of ripeness.

The Court of Appeals pointed out that *Williamson* was decided on two alternative grounds: (1) Because the respondent bank had not applied for variances that might have allowed greater development of its property, the government entity charged with implementing the regulations had not been given the chance to reach a final decision regarding the application of the regulations to the property at issue. This circumstance precluded the

court from determining whether the economic impact of the zoning laws and the extent to which they interfered with reasonable investment-backed expectations justified a finding of taking. (p. 3119); (2) The bank had not sought compensation through the procedures the state provided for doing so. As a consequence, it could not claim that its property had been taken without just compensation. (p. 3121)

Williamson was inapplicable in the case. *Furey* had obtained what *amounts to* a final decision regarding the application of the Open Space Ordinance to his property. (See *Furey v. City of Sacramento,* 24 Cal.3d 862, at 871; 157 Cal.Rptr. 684, at 689; 598 P.2d 844, at 849; *cert. denied;* 444 U.S. 976; 100 S.Ct. 476; 62 L.Ed 2d 403 [1979].)

In addition, *Furey* had *no remaining state procedure by which to secure compensation.* The California Supreme Court made clear that Furey's only remedy in a state court action would be declaratory relief or mandate precluding the application of the subject land-use regulations to his property. Because the state action would therefore have been merely a *procedure for review,* Furey's failure to pursue it does not disable him from bringing suit in federal court. (See *Furey,* p. 1450, fn.1.)

In substance the *Furey* court relied upon the fact that the landowner had no remaining procedure to secure compensation — there was left only a procedure for review. Here, the McMillans were in an identical situation when they sought review in 1982. The Water District had no ability to grant them any relief, let alone any compensation.

For the appeals court to conclude in the McMillan case that the limitations statute has not run is to open a

floodgate of applications which in turn would permit extensive potential litigation. The facts do not warrant that result.

POINT TWO

THE SUBSTANTIVE DUE PROCESS ANALYSIS OF THE NINTH CIRCUIT IS FLAWED

Judicial discretion to review a case may be exercised whenever the federal court of appeals has decided a federal question in a way which is in conflict with a state court of last resort. [Rule 17.1(a)]

The analysis of the Ninth Circuit is in direct conflict with the state court in *Hollister Park, supra.*

The pivotal question in this entire case is whether the Respondents were *potential* water users, or *actual* water users. If they were *potential* water users, they do not possess an absolute right to be treated in the same manner "*as existing* water consumers" within a water district. (Appendix A, p. 8) If they are potential water users, their substantive due process claim fails. (Appendix A, p. 9) The litigation is ended.

On the other hand, as the Ninth Circuit pointed out, if they are "actual users," the litigation is not over. Actual water users may have a substantive due process argument and *Hollister, supra,* does not apply.

The terminology is important. *Hollister* speaks of "existing water consumers" and "existing users of district's water." The issue then is whether, on summary judgment motion, the District was able to establish that viewing the evidence, *de novo*, in the light most favorable to the opposing party, there is no genuine issue of material fact

and that the moving party is entitled to judgment as a matter of law.

The Ninth Circuit has incorrectly assumed that the district court did not decide whether McMillans were "potential water users."

The district court said:

> "*For purposes of applying the statute of limitations*, the court will assume that plaintiffs could provide sufficient evidence to create a triable issue of fact over whether they were actual (or 'constructive') users and not merely potential users." [Emphasis added.] (Appendix C, p. 6)

Please keep in mind that the district court had been invited by the Ninth Circuit to decide the issue of the statute of limitations (Appendix D, p. 3-4). That court, in accepting the invitation, necessarily made the assumption stated.

However, later in the opinion, when it was necessary to analyze the case on summary judgment motion, the district court, in addressing the substantive due process issue, which is now the only heartbeat of this case, said:

> "*Hollister* [citation] involved an *identical* constitutional challenge to the very moratorium at issue in this case. Plaintiff there asserted an inverse condemnation claim, which was rejected on the ground that *plaintiff was only a potential* user of water." [Emphasis added.] (Appendix C, p. 14)

It is unfair to the Goleta Water District for the Ninth Circuit to conclude from the record that:

"... the district court *did not determine* whether the McMillans were actual water users, as they contended, or whether they were merely potential users." (Appendix A,

p. 8) [Emphasis added.] That portion of the opinion overlooks a material fact.

The district court assumed that the McMillans were actual users for purposes of deciding the statute of limitations issue, but determined that they were potential users in deciding the substantive due process issue. We submit that it is incorrect for that court to conclude that when the district court said the McMillans' case and the *Hollister* case involved "*identical*" constitutional challenges it *ignored* the obvious fact that *Hollister* rested on the claim of a *potential* water user. The trial court could never have made such an elementary error as that.

POINT THREE

THE DECISION OF THE NINTH CIRCUIT REGARDING ABSTENTION IS IN ERROR

Judicial discretion to grant a writ may be exercised whenever (1) a federal court has departed from the accepted and usual course of proceedings, or (2) a federal court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same issue. [Rule 17.1(a)]

The analysis by the district court and the review by the Ninth Circuit of the abstention issue as it relates to the substantive due process question appears to be making a distinction without a difference. The logic, to a trial lawyer, seems to be razor thin.

First of all, the district court decided that the Respondents' action was time-barred and that there was no equal protection claim. In wrapping up the substantive due process issue the court came as close to abstaining as can be practically done. The court said:

1. McMillans' "substantive due process claim should not be heard by this court." (Appendix C, p. 15)

2. The California court's decision in *Hollister Park, supra,* 82 Cal.App.3d 290, controls the disposi tion of the due process claims in this case. That case "involved an identical constitutional challenge to the very moratorium at issue in this case." (Appendix C, p. 15).

3. Under *Hollister Park* the McMillans' remedy is in the California courts. (Appendix C, p. 15)

4. It is inappropriate for the federal courts to administer the affairs of the Water District. (Appen dix C, p. 15)

5. To the extent that the McMillans seek an order requiring the District to find new water sources or justify the moratorium, "this court would be *required* to abstain." (Appendix C, p. 15)

6. "*Therefore*" the McMillans' claim for violation of substantive due process is dismissed. (Appendix C, p. 16)

We perceive that the district court has abstained; if not, the distinction is irrelevant.

The Ninth Circuit's analysis of abstention is also razor thin. After a careful review of a number of cases (Appen dix A, p. 10-11), the court points to *Agins v. City of Tiburon* [1979], 24 Cal.3d 266, 157 Cal.Rptr. 372; aff'd on other grounds, 447 U.S. 255 [1980], and concludes that it stands on something of a "precedential precipice." *But,* the Ninth Circuit candidly admits that if the California courts would conclude that *Agins* applies solely to zoning ordinances and not to the water moratorium ordinances,

and if the McMillans recover just compensation via an inverse condemnation action, "then the need for constitutional adjudication by the federal courts is obviated." (Appendix A, p. 11)

Moreover, it is very important to remember that in *Bank of America N.T.&S.A. v. Summerland County Water District* [1985], 767 F.2d 544, the Ninth Circuit affirmed the district court's decision to abstain from hearing a challenge to the application and interpretation of that water district's moratorium ordinance. [Note: Summerland is an area in Santa Barbara County just a few miles from Goleta; both districts obtain the majority of their water from the federally-owned Lake Cachuma; and both have had water moratoriums in effect since the early 1970's.) To distinguish between abstention in *Summerland, supra* and no abstention in *Goleta,* is again razor thin.

The Ninth Circuit weighed the words of *Summerland* and the district court decision in this case. It concluded that the district court did not abuse its discretion in "refusing" to abstain.

We recognize that as a general rule, ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari. (See Supreme Court Practice, Fifth Edition, Stern & Gressman 1978, p. 275.) Nevertheless, the fact remains that on the abstention issue, this *Goleta Water District* case and the *Summerland Water District* case, *supra,* appear to be irreconcilable; moreover, the Ninth Circuit distinguished the *Furey* case, *supra,* in a manner that is helpful, although probably not controlling, to this case on the issue of the statute of limitations.

We believe the analysis of all the case authority is truly strained. The only participant injured by that analysis is the Goleta Water District and the people who comprise it. The McMillans are not time-barred in the California State Courts pursuant to the Ninth Circuit's analysis, because the five-year statute of limitations has not yet expired. The state court is precisely where this case should be litigated. Instead of the public entity being fairly treated, the Ninth Circuit has permitted the case to continue in a jurisdiction where logic and reason would compel a different result.

We submit that the court: (1) has departed from the accepted and usual course of proceeding, and (2) has rendered a decision in conflict with a decision of an earlier appeals court on the same issue, to wit: The *Summerland* case, *supra.*

CONCLUSION

A request to the United States Supreme Court for a Writ of Certiorari is fraught with difficult hurdles. Then come certain cases that are important and special to a large segment of the public. There are those cases where injustice will be done unless there is intervention. More litigation will be necessary, more judicial time consumed. That can be prevented. That is the reason we respectfully request a hearing.

Dated: November 29, 1986.

Respectfully submitted,

THOMAS P. ANDERLE

Attorney for Petitioners

APPENDIX A

OPINION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A. FRANK MCMILLAN and GLADYS MCMILLAN,
Plaintiffs-Appellants,

v.

GOLETA WATER DISTRICT, EDWARD G. MASCHKE, PATRICIA SHEWCZYK, DONNA O. HONE, DONALD W. WEAVER, JACK D. WALKER, and LLOYD C. FOWLER,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
The Honorable Richard A. Gadbois,
District Judge, Presiding

Argued and submitted March 5, 1986
Pasadena, California

No. 85-5894
D.C. No. CV83-2746-RG

Filed: June 30, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: PREGERSON, POOLE, and THOMPSON,
Circuit Judges.

POOLE, Circuit Judge:

I
OVERVIEW

Frank and Gladys McMillan appeal the summary judgment of their 42 U.S.C. § 1983 claim for inverse condem-

nation and violations of their equal protection and substantive due process rights. The McMillans argue on appeal that (1) the Goleta County Water District ("Water District") took their property without just compensation by applying a water service moratorium to deny their application for water service; (2) the Water District subjected them to disparate treatment for an illegitimate governmental purpose; and (3) the Water District and the district court denied them substantive due process by relying on a California state court decision holding that the moratorium did not effect an unconstitutional taking of property. We affirm the dismissal of the equal protection claim, and reverse on the statute of limitations and due process issues.

II

FACTS AND PROCEEDINGS

In 1966, the McMillans acquired real property located within the Goleta County Water District. At that time, a residence on the property was supplied with water through a meter installed by the Water District. In 1967, the McMillans began to redevelop the property and to demolish the residence, and the water service was officially disconnected. Due to financial difficulties, the McMillans did not complete the redevelopment. In 1968, the Water District installed a new water meter on the property, but no water has been used on the property since 1967.

In December 1972, the Water District's board of directors declared the existence of a water shortage emergency, and enacted Ordinance No. 72-2, which imposed a moratorium on new water connections. The moratorium applied to the McMillans' property even though there was a "connection" (water meter) on the property, inasmuch as Section 9 of the Ordinance provided that

> [w]ater service shall not be provided through any existing, installed water service facilities which were not used for furnishing any significant quantity of water for any bonafide (sic) purpose at any time within five years prior to December 7, 1972, unless an applicant for water service through said facilities has satisfied the conditions of Sections 2, 3, 4 or 5 of this ordinance.

In May 1983, the Water District's voters adopted by referendum a "Responsible Water Policy Ordinance" also prohibiting new water connections during times of water shortage. On September 15, 1982, the McMillans formally applied to the Water District for renewal of their water service, claiming eligibility under Ordinance 72-2, Section 13.[1]

After a hearing, the Water District's board of directors denied the McMillans' request for an exception to the moratorium. The Water District's general manager denied the McMillans' request for reconsideration of their application on the basis of hardship.

On May 2, 1983, the McMillans commenced this action against the Water District and several of its officers and

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[1]Ordinance 72-2, Section 13 allows the Water District, in its discretion, to grant permits allowing for water service otherwise prohbiited if it finds that

> (1) the restrictions herein would cause an undue hardship or emergency condition or (2) that the granting of the permit will not adversely affect the water supply or service to other existing water consumers or (3) that due to peculiar facts and circumstances, none of the provisions of this Ordinance authorizing new water service are applicable to the situation under consideration, if the Board of Directors in its discretion finds that the applicant is entitled to substantially similar treatment as set forth in some provision of this Ordinance * * *.

employees. The district court dismissed the complaint for failure to state a claim upon which relief can be granted and for failure to properly allege subject matter jurisdiction. The McMillans appealed the dismissal, and this court remanded the case to the district court with instructions to grant the McMillans leave to amend their complaint to allege that they were at least "constructive" users of water.[2] The McMillans amended their complaint, alleging that they "at all times were actual users of water." They also alleged that their substantive due process rights were violated because the moratorium was irrational and a "sham" and that their equal protection rights were violated because other applicants were granted hardship exceptions while they were not. They requested damages for violations of their civil rights, interim damages for the temporary taking of their property, and an order directing the Water District to provide water service to the property. The Water District filed an answer to the amended complaint, alleging, *inter alia,* that the plaintiffs failed to state a claim upon which relief could be granted, that the district court lacked subject matter jurisdiction, that the claim was barred by the statute of limitations, and that the district court should abstain from exercising its jurisdiction. On May 3, 1985, the district court granted summary judgment to the Water District on the inverse condemnation and equal protection claims, and dismissed the substantive due process claim for lack of subject matter jurisdiction. The McMillans timely appealed.

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[2] *McMillan v. Goleta Water District,* No. 83-6024 (9th Cir. June 19, 1984) (memorandum disposition) acknowledged that mere "potential" water users had no property interest under California law subject to protection under the United States Constitution.

III

DISCUSSION

A. Standard of Review

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the opposing party, the district court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Triangle Mining Co. Inc. v. Stauffer Chemical Co.,* 753 F.2d 734, 738 (9th Cir. 1985). This court reviews *de novo* a district court's order of summary judgment. *Id.* This court also reviews *de novo* a district court's order dismissing a claim for lack of subject matter jurisdiction, favorably viewing the facts alleged to support jurisdiction. *Boettcher v. Secretary of Health and Human Services,* 759 F.2d 719, 720 (9th Cir. 1985).

B. Equal Protection Claim

Appellants assert that their right to equal protection was violated because applying the moratorium to them served no legitimate governmental purpose. However, they have set forth no evidence showing that the Water District's motivation was other than a rational interest in upholding the moratorium.[3]

> The mere showing of some discrimination by the state is not sufficient to prove an invasion of one's constitutional rights. * * * However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the

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[3]The primary "evidence" the McMillans set forth is speculation that the moratorium was enacted and continued in furtherance of an illegitimate "no growth" policy.

> classification does not bear a rational relationship to a legitimate state interest.

Construction Industry Ass'n, Sonoma City v. City of Petaluma, 522 F.2d 897, 906 n.11 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976). Inasmuch as the McMillans have not alleged the existence of a suspect classification or an invasion of fundamental rights, no genuine issue of material fact exists regarding their equal protection claim. Consequently, we affirm the district court's grant of summary judgment on the equal protection claim.

C. Inverse Condemnation Claim: The Statute of Limitations

In remanding this case to the district court, we directed that

> After the complaint is amended, the district court should explicitly consider whether the statute of limitations bars suit for discontinuation of actual or "constructive" use of water service. Also, if necessary, it should consider whether California law recognizes a property right to water service for constructive users and whether the district court should abstain from deciding this case under the doctrine established in *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941).

McMillan v. Goleta Water District, No. 83-6024 (9th Cir. June 19, 1984) (memorandum disposition), slip at 3. In their amended complaint, appellants alleged that they were actual users of water at the time the moratorium was declared. In its memorandum and order on remand, the district court assumed, for purposes of applying the statute of limitations, that "plaintiffs could provide sufficient evidence to create a triable issue of fact whether

they were actual (or 'constructive') users and not merely potential users."

The proper statute of limitations for this action is one year. *Wilson v. Garcia,* 105 S.Ct. 1938, 1949 (1985) (all Section 1983 claims are best characterized as personal injury actions); Cal. Code Civ. Proc. § 340(3) (statute of limitations for a cause of action for personal injury in California is one year). The district court here, before *Wilson v. Garcia* was decided, borrowed California's five-year statute under Code of Civil Procedure Section 336 governing actions for mesne profits of real property. Under either statute of limitations, appellants' claim would be barred if the cause of accrued in 1973 and 1974 (as asserted by appellees), and would not be barred if it accrued when the Water District issued the final denial of appellants' application on November 12, 1982 (as asserted by appellants). Thus the determinative issue is whether the cause of action accrued in or before 1974, or on November 12, 1982.

The district court determined that the McMillans' claim arose in 1973 or 1974 when they knew or should have know that their rights to continued water service had been interrupted on other than a temporary basis. In so doing, the district court relied on *Mosesian v. County of Fresno,* 28 Cal.App.3d 493, 104 Cal.Rptr. 655 (1972), which held that an inverse condemnation claim accrues when the taking is objectively complete, not when the claimant is subjectively convinced that the taking is permanent rather than temporary. The district court considered the Water District's final refusal of the McMillans' claim signficant only insofar as it caused the McMillans to become subjectively convinced of the permanence of their water deprivation. Under *Williamson County Regional Planning Commission v. Hamilton Bank*

of Johnson City, ____ U.S. ____, 105 S.Ct. 3108 (1985), this was error.

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Id. at 3117.[4] The rationale for this rule is that "[i]f [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Id.* (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.,* 452 U.S. 264, 297 (1981)). Thus the appellants' taking claim accrued on November 12, 1982, and consequently their commencement of this action on May 2, 1983 was not barred by the statute of limitations.

D. Substantive Due Process

Appellants assert that the district court erroneously dismissed their substantive due process claim in reliance on the conclusion implicit in *Hollister Park Investment Col. v. Goleta County Water District,* 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978), that the water moratorium was rationally related to a legitimate government pupose, i.e. water conservation and development. Appellants assert that it was error to compel them to accept the *Hollister*

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[4]Note that finality differs from exhaustion of remedies, which is not a prerequisite for suits predicated on 42 U.S.C. § 1983. *See Williamson County,* 105 S. Ct. at 3120.

decision as determinative of their federal taking claim, because they were not involved in the *Hollister* litigation.

The decision of the California Court of Appeal in *Hollister* was based on the premise that "[a] *potential* water user does not possess 'an absolute right to be treated in the same manner as existing water consumers within [a] water district ***.' " 82 Cal.App.3d at 294, 147 Cal. Rptr. at 93 (emphasis added). Thus *Hollister Park* stands for the proposition that Goleta's water moratorium is constitutional *as applied* to *potential users* of water. Yet here the district court did not determine whether the McMillans were actual water users, as they contended, or whether they were merely potential users. *Hollister* is applicable only once this determination is made. Therefore the district court's dismissal of the McMillans' substantive due process claim in light of *Hollister* was erroneous, and is reversed and remanded for the district court to determine whether the McMillans were actual or potential water users. If it finds that they were only potential users, their substantive due process claim must fall in light of *Hollister*. If it finds that they were actual users, the district court will be faced with the issue, left undecided by both the United States Supreme Court and the Ninth Circuit, whether property owners can recover damages for inverse condemnation. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636-61 (1981), a majority of the Supreme Court indicated it "apparently is of the opinion — contrary to that of the California Supreme Court in [*Agins v. City of Tiburon*, 24 Cal. 3d 266 (1980)] — that damages *are* recoverable for inverse condemnation." *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1148 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983) (emphasis in original) (*Martino* also refrained from deciding whether property owners could recover damages for inverse condemnation).

However, because the Supreme Court concluded that it lacked jurisdiction in *San Diego Gas*, it did not decide the issue whether a state "must provide a monetary remedy to a landowner whose property allegedly has been 'taken' by a regulatory ordinance claimed to violate the Just Compensation Clause of the Fifth Amendment." *San Diego Gas*, 450 U.S. at 623. *See also Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980).

E. Abstention

The appellees argue that the district court should have abstained under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The application of the *Pullman* doctrine is at the sound discretion of the trial court. *Bank of America National Trust and Saving Association v. Summerland County Water District*, 767 F.2d 544, 546 (9th Cir. 1985).

Pullman abstention is appropriate when three tests are met.

> (1) The complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."
>
> (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."
>
> (3) The possibly determinative issue of state law is doubtful.

Canton v. Spokane School District #81, 498 F.2d 840, 845 (9th Cir. 1974), citing *Pullman; Midkiff v. Tom*, 702 F.2d 788, 789 n.1 (9th Cir. 1983), *rev'd on other grounds, sub nom. Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

The allocation of water during times of water shortage is a sensitive area of social policy. *See Summerland*, 767 F.2d at 546. Thus the first *Pullman* criterion is met. Whether the second and third criteria are fulfilled requires analysis of the precedential value of *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). In *Agins*, the California Supreme Court was "persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged," *id.* at 275, 157 Cal. Rptr. at 376, and "that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *Id.* at 276-77, 157 Cal. Rptr. at 378. The Court reasoned that

> Community planners must be permitted the flexibility which their work requires. * * *
>
> [T]he utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary. * * * The weighing of costs and benefits is essentially a legislative process. In enacting a zoning ordinance, the legislative body assesses the desirability of a program on the assumption that compensation will not be required to achieve the objectives of the ordinance. * * * Legislation in the nature of zoning can be and has been enacted by the people through a direct initiative. Are the voters, through the initiative power, also to have this unwelcome power to *inadvertently* commit funds from the public treasury?

Id. at 275-76, 157 Cal. Rptr. at 377 (emphasis in original). However, the precedential value of *Agins* has been called into doubt. *See Bank of America National Trust and Saving Association v. Summerland County Water District*, 767 F.2d 544, 547 (9th Cir. 1985) (after *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 660-661 (1981), "*Agins* stands on something of a precedential precipice.") If the California state courts would conclude that *Agins* applies solely to zoning ordinances, and not to the water moratorium ordinance, and if the McMillans recover just compensation via an inverse condemnation action, then the need for constitutional adjudication by the federal court would be obviated.[5]

However, a federal court need not abstain merely because there exists the abstract possibility that state courts might render adjudication of the federal question unnecessary. *Hawaii Housing Authority v. Midkiff*, 467

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[5]Under California law, inverse condemnation claims based on the *taking* of private property are subject to a five-year statute of limitations. Cal. Code Civ. Proc. §§ 318, 319 (West 1982). *See Garden Water Corp. v. Fambrough*, 245 Cal. App. 2d 324, 328 53 Cal. Rptr. 862, 864-65 (1966); *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 373-74 28 Cal. Rptr. 357, 374-75 (1963); *Ocean Shore R.R. Co. v. City of Santa Cruz*, 198 Cal. App. 2d 267, 270-72 17 Cal. Rptr. 892, 894-95 (1961). However, inverse condemnation claims based on "acts of *trespass or injury* to property which do not involve the taking or damaging of private property for a public use" are subject to a three-year statute of limitations (Cal. Code Civ. Proc. § 338, subd. 2 (West 1982)). *Frustuck*, 212 Cal. App. 2d at 374, 28 Cal. Rptr. at 375 (emphasis added). *See also Leaf v. City of San Mateo*, 104 Cal. App. 3d 398, 405 n.2, 163 Cal. Rptr. 711, 715 n.2 (1980); *Garden Water*, 245 Cal. App. 2d at 328, 53 Cal. Rptr. at 864-65; *Ocean Shore*, 198 Cal. App. 2d at 270-71, 17 Cal. Rptr. at 894. Because the McMillans' state inverse condemnation claim would apparently be based on a taking rather than on a trespass, the five-year statute of limitations would apply, so their state suit would not be time-barred.

U.S. at 237. *See also Midkiff v. Tom*, 702 F.2d at 789-790, n.1. Consequently the district court did not abuse its discretion by failing to abstain.

IV
CONCLUSION

The grant of summary judgment to the Water District on the equal protection claim is affirmed. The dismissal of the substantive due process claim is reversed, as is the dismissal of the taking claim as time-barred.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

ORDER

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. FRANK MCMILLAN AND GLADYS MCMILLAN,
Plaintiffs-Appellants,
v.
GOLETA WATER DISTRICT, EDWARD G. MASCHKE, PATRICIA SHEWCZYK, DONNA O. HONE, DONALD W. WEAVER, JACK D. WALKER, and LLOYD C. FLOWER,
Defendants-Appellees.

No. 85-5894
D.C. No. CV 83-2746-RG

Filed: September 10, 1986 Cathy A. Catterson, Clerk
U.S. Court of Appeals

Before: PREGERSON, POOLE, and THOMPSON, Circuit Judges.

The petition for rehearing is denied.

APPENDIX C

MEMORANDUM AND ORDER

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

A. FRANK MCMILLAN and GLADYS BOTTROFF MCMILLAN

Plaintiffs,

v.

GOLETA WATER DISTRICT, EDWARD G. MASCHKE, PATRICIA SHEWCZYK, DONNA O. HONE, DONALD W. WEAVER, JACK D. WALKER, LLOYD C. FOWLER,

Defendants.

No. CV 83-2746 RG

Filed: May 1, 1985 Clerk, U.S. District Court
Central District of California

This matter came before the court for a hearing on April 22, 1985, regarding defendants' motion for summary judgment under Federal Rule of Civil Procedure 56. Having taken the matter under submission, the court has carefully considered the arguments raised at the hearing and in the parties' briefs, declarations, and other supporting papers. For the reasons stated below, the court shall enter summary judgment for defendants on plaintiffs' claims for inverse condemnation and violation of their rights to equal protection under the fifth and fourteenth amendments, and shall dismiss plaintiffs' remaining claims for violations of their right to substantive due process, as these claims are not properly before this court.

BACKGROUND

This is an action for inverse condemnation arising from the refusal of the Goleta Water District (the "District") to supply water service to plaintiffs' property in Santa Barbara County. This court originally dismissed plaintiffs' complaint for failure to state a claim upon which relief can be granted and for failure properly to allege subject-matter jurisdiction. On June 19, 1984, however, the United States Court of Appeals for the Ninth Circuit remanded the case with instructions to permit plaintiffs to amend their complaint. Because it now appears that plaintiffs' takings claim is time-barred, that their due process claim cannot be entertained by this court, and that any equal protection claim discernable from their pleadings is deficient as a matter of law, the court again determines that defendants are entitled to judgment as a matter of law.

The undisputed facts, construed in the light most favorable to plaintiffs, can be summarized as follows:

Plaintiffs Frank and Gladys McMillan purchased the property in question in mid-1966 and in June of 1967 demolished the existing structure — a duplex — with the intention of subdividing the lot and developing six housing units. Although the District had been providing water service to the property since 1961 to its previous owner, all water usage ceased soon after the McMillans took over the land, apparently because of their construction plans. In 1967 the water service was officially disconnected (at whose request is unclear), thereby relieving the McMillans of any obligation to pay the monthly basis meter charge that is assessed even if no water is used. In 1968, however, the meter was replaced; a new one remained intact until 1983, when defendants

ordered it removed and took plaintiffs off their "active status" billing accounts.

With the exception of a leak in 1973 no water has been used on the property since the date when service first stopped. Plaintiffs could have had their water service restored any time before 1972. But they chose not to do so, evidently because their development plans were sidetracked by other projects in the years immediately following purchase of the property.

On December 21, 1972, the District's board of directors adopted an ordinance imposing a moratorium on new water connections because of an alleged imbalance between the District's steady supplies and existing demands. Under that ordinance water service would not be renewed for any existing facility unless during the previous five years a significant quantity of water had been used for a *bona fide* purpose. If water service had been disconnected, then the District would routinely treat a request for renewal as an application for new water service, requiring the applicant to qualify under the ordinance's hardship exception. In May of 1973 the District's voters adopted by referendum a "Responsible Water Policy Ordinance" also prohibiting new water connections during a time of water shortage.

Although the McMillans did not make any written application for the restoration of water service until 1982, the record clearly shows that soon after the moratorium went into effect plaintiffs became aware that the service would not be restored to their property because of the moratorium. Mr. McMillan admits in his deposition that "I do recall trying (the faucet) several times and there was no water available after the '72 moratorium . . . I did try at different times to turn the meter on and evidently the meter was shut off according to the records."

Plaintiffs allege they made repeated verbal requests after the moratorium to have their water service renewed. Mr. McMillan also avers that beginning in 1974, he made regular visits to the water board to inquire about the status of the moratorium and the possibility of its being lifted. Plaintiffs contend they postponed any additional action, such as applying for an exception, because they believed any such request would be futile and were deceived by the District's representatives into thinking that the ordinance would be repealed at any time — once the water emergency had ended.

In any event, on September 15, 1982, the McMillans formally applied to the District for renewal of water service through their inactive meter. In the application for an exception to the moratorium, McMillan provided the following explanation of the circumstances entitling him to renewed service and to immediate action by the District:

> . . . Discontinuance of service was due to demolition of old duplex no longer fit for a residance [sic] . . . Due to financial reverses in the 60's I could not complete building of the duplex. . . . Had I known there would be a water moratorium I would not have had the service disconnected. We want water to re-build former existing buildings on the property. A sale is pending on our getting water to the property. (Property is valueless without water.)

The board denied the request on October 7, 1982, after hearing the McMillans' testimony and reviewing the records of his account, as well as other evidence. The minutes of that meeting reveal that the only stated basis for the board's decision was their view that McMillans' request would constitute a new use not permissible under the ordinance.

In remanding the case to this court, the Ninth Circuit offered the following guidance:

> . . . [We] assume that the district court interpreted the complaint to allege only that the McMillans were *potential* users of water when service was denied. Under California law, while an actual user of water apparently does have a property right that is taken if water service is discontinued, a potential user of water has no such property right. . . .
>
> At oral argument, . . . the McMillans asserted that they sought to allege that they were actual, or at least more than mere "potential," users of water. . . . [T]he McMillans should be granted leave to amend their complaint to allege that there were actual or constructive users of water.
>
> . . . After the complaint is amended, the district court should explicitly consider whether the statute of limitations bars suit for discontinuation of actual or "constructive" use of water service. Also, if necessary, it should consider whether California law recognizes a property right to water service for constructive users and whether the district should abstain from deciding this case under the doctrine established in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

Plaintiffs filed their first amended complaint on August 28, 1984. This complaint together with the other papers filed by plaintiffs can be construed as asserting the following claims for relief. First, plaintiffs allege that the District's actions amounted to an inverse condemnation of their property and a taking under the fifth amendment. Thus plaintiffs now contend that they were *actual* users of water at the time the moratorium began and defendants

refused to restore water service, rendering plaintiffs' property valueless. Second, plaintiffs evidently claim a violation of their substantive due process rights, contending that the moratorium was irrational and a "sham." Plaintiffs allege that the emergency conditions said to support the measure do not exist in reality and amount to nothing more than a thinly-disguised excuse for pursuing a "no growth" policy toward construction. Finally, plaintiffs appear to claim their rights to equal protection have been violated in that other appliants have been granted hardship exceptions while plaintiffs were not. All of these claims are asserted not only against the District but also against several individuals who are officers or employees of the District.

DISCUSSION

A. Plaintiffs' Claims For Inverse Condemnation Are Barred By The Statute Of Limitations.

The Court of Appeals in its memorandum disposition first instruct this court to consider whether the applicable statute of limitations bars suit by plaintiffs for "discontinuation of actual or 'constructive' use of water service." The court presumes that this phrase refers to the McMillans' primary claim for inverse condemnation based on the imposition of the water moratorium. For the purposes of applying the statute of limitations, the court will assume that plaintiffs could provide sufficient evidence to create a triable issue of fact over whether they were actual (or "constructive") users and not merely potential users.

In determining the appliable limitations period for an action in inverse condemnation brought, as here, under 42, U.S.C. § 1983 (the Civil Rights Act of 1871), federal courts must apply the most analogous state statutes of

limitations. *See Bradshaw v. Zoological Society of San Diego,* 569 F.2d 1066, 1068 (9th Cir. 1978). Under California law a suit for inverse condemnation based on a "taking" rather than a "damaging" of property is subject to the five-year limitations period of California Code of Civil Procedure, § 336. *Garden Water Corporation v. Fambrough,* 245 Cal.App.2d 324, 327-8, 53 Cal.Rptr. 862, 864-5 (1966); 2 B. Witkin, *California Procedure* (2d Ed. 1970), § 323 at 1167-68. Hence, plaintiffs' takings claim, filed May 2, 1983, would be time-barred if the cause of action arose before May 2, 1978 and the statute of limitations was not otherwise tolled. As indicated below, the court finds that the claim matured well before 1978 and that the statute should not be tolled by virtue of any alleged representations of the District regarding the length of or need for the moratorium.

California law holds that "(t)he cause of action ordinarily accrues when, under the substantive law, the wrongful act is done and the obligation or liability arises, i.e., when a suit any be brought." 2 *Witkin, supra,* § 263 at 1116 (emphasis omitted). In order to apply the general rule in this case, the court must determine, first, if the inverse condemnation claim arose at the time plaintiffs' application for an exception was formally denied in 1982, at the time the moratorium first went into effect in 1972, or at some point in between; and second, whether the circumstances of this case fall within the "continuing wrong" doctrine, application of which would permit plaintiffs to bring suit any time over the life of the moratorium.

In deciding when a cause of action for inverse condemnation arises, California courts have expressed a preference for the view that the taking is complete and the statute begins to run once the interference with

plaintiff's property right is permanent in an objective sense. In *Mosesian v. County of Fresno,* 28 Cal.App.3d 493, 104 Cal.Rptr. 655 (1972), plaintiffs had recovered damages from the defendant county for an inverse condemnation that occurred when three acres of land held by plaintiffs' predecessor-in-interest were used as a ponding area as part of a residential subdivision plan imposed by county. Plaintiffs did not bring their administrative claim until eleven years after the completion of excavation and work in the area, although they filed their lawsuit in state court immediately upon rejection of that claim. The court of appeal decided the suit was barred by the then-applicable one-year statute of limitations despite plaintiffs' contention that until the administrative decision they did not know subjectively whether the taking was a fee interest and permanent or merely an easement and temporary. 28 Cal.App.3d at 501-2, 104 Cal.Rptr. at 660-1.

The *Mosesian* court's lengthy approach to this problem is instructive for this case:

> The amorphous concept of when a cause of action arises in an inverse condemnation claim has been treated in a number of cases. Notwithstanding some inconsistencies in the language of the cases, each makes clear that the time is not limitless. None supports Mosesians' contention that though a taking is objectively total and the improvement complete, the time for filing a claim is postponed until the claimant is subjectively convinced the taking is permanent rather than temporary. None suggests, as Mosesians contend herein, that there must be a judicial determination of permanency before the time within which a claim must be filed starts to run. None suggests that an uncertainty with respect to whether

> a fee or easement is being claimed by the public agency justifies postponement of filing a claim.

28 Cal.App.3d at 501, 104 Cal. Rptr. at 660-1. *See Aaron v. City or Los Angeles,* 40 Cal.App.3d 162, 491-2, 115 Cal.Rptr. 162, 176 (1974) (claim for inverse condemnation based on jet noise from local airport arises once defendant's activities substantially interfere with use and enjoyment of plaintiff's property and result in diminution of market value, although plaintiffs may postpone suit until situation has stabilized), *cert. denied* 419 U.S. 1122 (1975); *Wyoming State Highway Department v. Napolitano,* 578 P.2d 1342, 1350-1 (Wyo S. Ct. 1978) (claim matures when plaintiff knows or should have known that taking is complete, based on factors such as "when the taking is apparent or discoverable" or "when there is substantial interference resulting in a decline in market value."), *appeal dismissed,* 439 U.S. 948.

Under the objective test the court can disregard the McMillans' claim that they did not know the taking of their water rights was permanent until the District formally rejected their hardship application in 1982. This is no more persuasive than was the claim in *Mosesian* that the invasion of plaintiffs' land could not be final until there had been an administrative finding as to the nature of the state's interest. To the contrary, the taking here occurred once it became clear that the moratorium actually applied to plaintiffs' property and could not be considered a temporary measure, for it would logically be at this time that the ordinance substantially interfered with the marketability of the land.

The factual record before the court supports a finding that the McMillans' cause of action for inverse condemnation arose well before May, 1978, the relevant

date five years before plaintiffs filed suit. To begin with, plaintiffs' own admissions flatly contradict any assertion that they might now make that they were unaware the moratorium applied to them. Plaintiffs urge they were actual users of water when the measure took effect and made repeated verbal requests to have the water turned back on, all unsuccessful because of the moratorium. Further, assuming plaintiffs were entitled to believe in 1972 that the moratorium would be short-lived, this good faith belief could not last forever. The moratorium was adopted not only by the District's board in December of 1972 but also by the voters of the District themselves in May of 1973. No annual renewal vote by either body occurs; the moratorium stays in effect until the District votes to lift it. Finally, unlike some inverse condemnation cases in which the invasion of plaintiff's property is gradual in nature and not easily discoverable at first, here there was a total deprivation of water service as soon as the measure went into place. As early as 1973 or 1974 plaintiffs knew or should have known that their rights to continued water service had been interrupted by the District on other than a temporary basis.[1]

The court must additionally reject plaintiffs' position that the moratorium gave rise to a "continuing wrong" such that plaintiffs could bring a takings claim at any time. Two cases have dealt directly with this issue, reaching different results: *Ocean Acres Limited v. Dare County*

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[1]Indeed, "assuming the law sanctions postponement of filing a claim until the claimant subjectively knows the taking is permanent," *Mosesian,* 28 Cal.App.3d at 502, 104 Cal.Rptr. at 661, the record would not support plaintiffs' claim that this did not occur until 1982. Rather, as earlier discussion of the facts indicated, the McMillans early on regarded any request to have water service restored as futile. *Cf. Mosesian,* 28 Cal.App.3d at 503, 104 Cal.Rptr. at 662.

Board of Health, 707 F.2d 103 (4th Cir. 1983), which refused to find a continuing wrong; and *Lockary v. Kayfetz,* 587 F. Supp. 631 (N.D. Ca. 984), which did apply the doctrine. For reasons explained below the court adopts the analysis of *Ocean Acres.*

In *Ocean Acres* a developer brought an action against defendant county challenging its adoption of a septic tank ban as a taking of property and a violation of due process. The court, in rejecting plaintiff's argument that it had a right to damages accruing throughout the life of the moratorium, held that it did not constitute a continuing wrong and reasoned thus:

> . . . Although it is indisputable that the moratorium was in existence until March 1978, this fact does not end the inquiry of whether the "continuing wrong" exception applies . . . "The particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged must all be considered." . . .

. . . Plaintiff was aware of the actions taken by the county and of the impact of those actions on its proposed development. The general partners were advised that issues could be litigated; in June 1972 they wrote a letter . . . requesting information on the septic tank ban . . . Although it may be apparent in hindsight that the decision to develop the property was ill-advised, a "continuing wrong" theory should not provide a means of relieving plaintiff from its duty of reasonable diligence in pursuing its claims.

707 F.2d at 106-7 (citations omitted).

Lockary involved a situation even more similar factually to the one involved in the McMillan action. Plaintiffs, owners of undeveloped land in the unincorporated coastal

community or Bolinas, brought suit to challenge a 12-year old moratorium on new water hook-ups pursuant to a declared "water emergency." The court rejected the defendants' statute of limitations defense and held the continuing wrong exception provided a basis for any claim arising out of the enforcement and enactment of the moratorium. The court wrote:

> [T]he continuing wrong exception does provide a basis for maintaining plaintiffs' claims with respect to the water moratorium itself. That exception provides that "where a continuous chain of events or course of conduct is involved, the cause of action accrues at the time of the final act in that series of events or course at conduct." *Barbaccia v. County of Santa Clara,* 451 F. Supp. 260, 266 (N.D. Cal. 1978), *citing U.S. v. Dickenson*, 331 U.S. 745, 67 S.CT. 1382, 91 L.Ed. 1789 (1947). "The purpose of the rule is not only to avoid multiple actions but to allow aggrieved property owners to assess the full extent of their losses before filing suit." *Id.*
>
> Reading the complaint in the light most favorable to plaintiffs' the continuation of the moratorium can reasonably be said to constitute a continuing wrong. At the heart of the complaint is the contention that, although a temporary water moratorium is one thing, an "emergency" lasting twelve years is a taking. They allege that it is the unlawful duration of the moratorium which constitutes the continuing wrong.

587 F. Supp. at 635-6.

The court declines to adopt *Lockary's* application of the continuing wrong doctrine to plaintiffs' inverse condemnation claim. What the analysis in *Lockary* fails to acknowledge is that under controlling California law the

wrong involved in a taking is complete once the invasion of plaintiff's right is permanent in an objective sense, even if that taking is accomplished through the means of a moratorium. The moratorium may be continuing, but the cause of action for inverse condemnation accrues as soon as the property owner knows or should have known that his rights have been substantially interfered with. To be sure, one can challenge a moratorium such as that involved here at any time on the ground that it is unconstitutional because it lacks a rational basis; this is the gist of the McMillan's substantive due process claims. In the case of such a general challenge, the wrong continues so long as the law is in place. But as far as an inverse condemnation claims goes, any damage suffered by plaintiffs was caused when the ban was originally enacted and applied to plaintiffs' property. "A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981). *Cf. Pierpont Inn, Inc. v. State*, 70 Cal.2d 282, 293, 74 Cal.Rptr. 521, 528-9 (1969) (owner of condemned property entitled to postpone suit until completion of state project in order to assess damages).

Finally, the court should not rule that the statute of limitations was tolled because of continual representations by the District's officials that a water emergency existed and the moratorium was only temporary. The Ninth Circuit has stated: "To avoid the bar of litigation by invoking the concept of fraudulent concealment, the plaintiff must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978). Here, the allegations regarding statements

about the existence of a water emergency, even if accepted at face value, would be irrelevant to the issue of fraudulent concealment. *Cf. Ocean Acres,* 707 F.2d at 105 (claim that county exaggerated basis for septic tank ban would not amount to fraudulent concealment). A constitutional claim for taking does not depend on proof that the state lacked a valid purpose in acting as it did; the only question is whether the state took a property right without providing just compensation. Further, assuming that representations as to the duration of the moratorium could have somehow concealed from plaintiffs the existence of an inverse condemnation claim, the McMillans' allegations in this regard are entirely conclusory and unsupported by any admissible evidence. *See Lockary,* 587 F. Supp. at 635. Indeed, plaintiffs appear to concede that any belief they had in the short duration of the water moratorium actually derived from a misplaced hope that the District's board would be replaced by pro-growth candidates at the next election.

B. Plaintiffs' Substantive Due Process Claim Should Not Be Heard By This Court.

Hollister Park Investment Co. v. Goleta County Water District, 82 Cal.App.3d 290, 147 Cal.Rptr. 91 (1978), involved an identical constitutional challenge to the very moratorium at issue in this case. Plaintiff there asserted an inverse condemnation claim, which was rejected on the ground that plaintiff was only a potential user of water. 82 Cal.App.3d at 294, 147 Cal.Rptr. at 93. In addition, as here, the plaintiff contended that the Goleta ordinance was unconstitutional because it had been continued on an

irrational basis. The California court's disposition of this contention controls the McMillans' due process claims:

> The landowner seeks to avoid the inevitable impact of controlling precedent by arguing that in reality the ordinances represent the adoption of a "no growth" policy in the form of a studied and deliberate plan to avoid acquisition of sufficient water resources to serve new customers of the district. (see *Swanson v. Marin Mun. Water Dist., supra,* 56 Cal.App.3d 512, 524, 128 Cal.Rptr. 485). That argument misconstrues the ordinances and initiative. Ordinances 72-1 and 72-2 represent interim legislation which was replaced by the initiative. The initiative does not prohibit the district's acquisition of new water sources. To the contrary, it mandates that the district seek additional sources of water. It permits denial of access to district water to new users only when there is a drought caused emergency. The only restriction upon the development of the new sources is voter approval of their cost. In essence, then, the initiative represents a moratorium upon new service connections during drought conditions while a feasible and financially acceptable plan for expansion is developed. *Damage to the landowner caused by the moratorium is not compensable. Its remedy if the board of the district does not carry out the obligation imposed by the statute lies in a petition for mandate. (Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 125, 109 Cal.Rptr. 799, 514 P.2d 111; see also *HFH, Ltd., v. Superior Court* (1975) 15 Cal.3d 508, 53, 125 Cal.Rptr. 365, 542 P.2d 237.)

82 Cal.App.3d at 294, 147 Cal.Rptr. at 93 (emphasis supplied).

Under the authority of *Hollister Park,* then, the plaintiffs should pursue any remedy they might have through the procedures outlined under California Code or Civil Procedure § 1085. It would be wholly inappropriate for this court to take up the complex task of administering the affairs of the Goleta Water District. Indeed, to the extent that plaintiffs actually seek by this action an order requiring the District to search out new water sources or otherwise justify the continuation of the water moratorium, this court would be required to abstain from deciding the matter. *Kolisman v. City of Los Angeles,* 737 F.2d 830, 833-4 (9th Cir. 1984), *cert. denied* ____ U.S. ____, 105 S.Ct. 1179. The court, therefore, orders that plaintiffs' claims for violation of the rights to substantive due process be dismissed for lack of subject-matter jurisdiction.

C. Plaintiff Has Failed To Show The Existence Of Any Triable Issue Of Fact With Regard To Its Apparent Equal Protection Challenge.

In addition to their other allegations, plaintiffs apparently claim in their opposition papers that they have been denied the equal protection of the laws in that others were granted hardship exceptions but not plaintiffs. It hardly needs stating that this fact alone does not make out a valid equal protection claim. As the Ninth Circuit has stated:

> The mere showing of some discrimination by the state is not sufficient to prove an invasion of one's constitutional rights. Most legislation to some extent discriminates between various classes of persons . . . However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest.

Construction Ind. Ass'n, Sonoma City v. City of Petaluma, 522 F.2d 897, 906 n.11 (9th Cir. 1975), *cert. denied* 424 U.S. 934 (1976). The McMillans have not presented any evidence that their treatment by the District was motivated by anything other than a rational interest in upholding the moratorium by refusing to renew service through a long inactive water meter. The denial of water service to the plaintiffs, while it may impose an obstacle to their ability to resell their property, does not in and of itself constitute a violation of their rights to equal protection under the fourteenth amendment.

Accordingly, it is HEREBY ORDERED THAT summary judgment be entered for defendants on plaintiffs' claims for inverse condemnation and denial of equal protection and that plaintiffs' claim for violation of their right to substantive due process be dismissed.

RICHARD A. GADBOIS, JR.
United States District Judge

DATED: 1 May 1985

APPENDIX D

MEMORANDUM*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A. FRANK MCMILLAN and GLADYS BOTTROFF MCMILLAN,
Plaintiffs-Appellants,

v.

GOLETA WATER DISTRICT, EDWARD G. MASCHKE, PATRICIA SHEWCZYK, DONNA O. HONE, DONALD W. WEAVER, JACK D. WALKER, LLOYD C. FOWLER,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, District Judge, Presiding
Argued and Submitted March 5, 1984

No. 83-6024
DC CV 83-2746-RG

Filed: June 19, 1984 Phillip B. Winberry,
Clerk, U.S. Court of Appeals

Before: CHAMBERS, SNEED, and BOOCHEVER, Circuit Judges.

A. Frank McMillan and Gladys McMillan appeal the district court's dismissal of their pro se inverse condemnation suit against the Goleta Water District (District),

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the *Federal*

members of the District's board of directors, and District employees. Motivated by our general concern for pro se litigants and our belief in at least the possibility of the existence of an actionable claim on the part of the McMillans, we remand the case to the district court with instructions to permit the plaintiffs to amend their complaint.

I.

BACKGROUND

We cannot state the facts with completeness. It does appear, however, that in 1966, plaintiffs purchased land in Santa Barbara County, California. The buildings on the property were demolished. The McMillan's attempt to construct a new housing project on the property was thwarted because the District, acting pursuant to water ordinances passed in the early seventies, refused to provide water service to them.

After failing in their attempt to secure a hardship permit for water use, the McMillans filed the instant inverse condemnation suit in district court. The complaint alleges that the District's refusal to provide water service constituted a taking without just compensation in violation of the Fifth Amendment to the U.S. Constitution. We cannot say that no set of facts, comsistent with those set forth in the complaint, could support such a claim. The district court, however, dismissed the suit.

Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

II.

ANALYSIS

Although the district court did not outline its reasons for dismissing the suit, we assume that the district court interpreted the complaint to allege only that the McMillans were *potential* users of water when service was denied. Under California law, while an actual user of water apparently does have a property right that is taken if water service is discontinued, a potential user of water has no such property right. *See Hollister Park Investment Co. v. Goleta County Water District,* 82 Cal. App. 3d 290, 293-94, 147 Cal. Rptr. 91, 93 (1978); *Swanson v. Marin Municipal Water District,* 56 Cal. App. 3d 512, 522-23, 128 Cal. Rptr. 485, 491-92 (1976). Thus, if the complaint alleged that the McMillans were merely potential users of water rather than actual users, the district court's dismissal was correct. Under those circumstances no "property" was taken from them.

At oral argument, however, the McMillans asserted that they sought to allege that they were actual, or at least more than mere "potential," users of water. According to the McMillans, the property did have water service when they purchased it, though this service has not been used since the demolition of the original buildings. Under Rule 15(a) of the Federal Rules of Civil Procedure, the McMillans should be granted leave to amend their complaint to allege that they were actual or constructive users of water.

The case is remanded to the district court with instructions to grant the McMillans leave to amend their complaint. After the complaint is amended, the district court should explicitly consider whether the statute of limitation bars suit for discontinuance of actual or "construc-

tive" use of water service. Also, if necessary, it should consider whether California law recognizes a property right to water service for constructive users and whether the district court should abstain from deciding this case under the doctrine established in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

REMANDED WITH INSTRUCTIONS.

APPENDIX E

ORDER OF DISMISSAL

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

A. FRANK MCMILLAN, et al.,
Plaintiffs,

v.

GOLETA WATER DISTRICT, et al.,
Defendants.

No. CV 83-2746 RG (MCx)

Filed: June 21, 1983 Clerk, U.S. District Court
Central District of California

The court having considered the matter, it is hereby

ORDERED that defendant's Motion to Dismiss for Failure to Allege Jurisdiction and Failure to State a Claim Upon Which Relief May be Granted is granted.

RICHARD A. GADBOIS, JR.
United States District Judge

DATED: June 21 1983

APPENDIX F

ORDINANCE NO. 72-2

GOLETA COUNTY WATER DISTRICT PROHIBITIONS AND RESTRICTIONS ON NEW WATER SERVICE CONNECTIONS

BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE GOLETA COUNTY WATER DISTRICT AS FOLLOWS:

SECTION 1. PROHIBITION ON NEW SERVICE CONNECTIONS, FACILITIES AND CONSUMPTION.

No new, additional, further, expanded or increase-in-size water service connections, meters, main extensions or other water service facilities of any kind, shall be made, allowed, approved or accepted after December 7, 1972, except as expressly provided herein. Hereafter, the phrase "new water service facilities" shall be deemed to refer to and include each of the above. The uses restricted and prohibited herein are found by the Board of Directors to be nonessential.

SECTION 2. PROVISIONS FOR FACILITIES INCLUDING MAIN EXTENSIONS APPROVED PRIOR TO DECLARATION OF EMERGENCY.

Any applicant who filed a written application for new water service facilities which include or require new or extended District mains, paid all fees and charges required by the District, filed the requisite construction plans, bonds, guarantees and all other necessary documents, and performed all other things required by the

District's rules and regulations, all on or before December 7, 1972, shall be entitled to proceed with the construction and installation of said new water service facilities, and all further new water service facilities reasonably and necessarily appurtenant thereto, and to have water service supplied therethrough, provided that both of the following additional conditions are also fulfilled:

(1) The Applicant actually, bonafidely and significantly commences the construction or installation of said new water service facilities within 120 days from December 7, 1972; and

(2) The Applicant obtains the issuance of a certificate of occupancy for each structure to be served by said water service facilities on or before December 6, 1973, provided that in the event that on that date certificates of occupancy have been issued for some, but not all, of the structures shown on the plans of file with the District, water service shall be allowed for those structures which have certificates of occupancy, but not to the remainder of said structures. In furtherance of this provision, the Board of Directors may in its discretion authorize changes in the design and construction of said facilities necessary to effectuate water service provided the number of water service connections is not increased.

None of the District's standard form letters customarily sent to the Planning Department of the County of the City of Santa Barbara indicating that the Applicant's project is within the District and is entitled to water service subject to the rules and regulations of the District establish any right to water service facilities, connections or service prohibited by this Ordinance.

SECTION 3. PROVISIONS FOR NEW FACILITIES NOT INCLUDING MAIN EXTENSIONS APPROVED PRIOR TO DECLARATION OF EMERGENCY.

(a) Any Applicant for new water service facilities not requiring new or extended District mains who paid all fees and charges, and performed all other things required by the District's rules and regulations, all on or before December 7, 1972, shall be entitled to proceed with the construction and installation of said new water service facilities, and to have water service supplied therethrough, provided that all of the following conditions are also satisfied:

(1) The Applicant files a written application for a building permit with the Santa Barbara County or City Building Department within 120 days from December 7, 1972; and;

(2) The Applicant thereafter obtains the issuance of a building permit pursuant to said application, and thereafter constructs a building pursuant to the terms of said building permit.

(b) Any Applicant for new water service facilities not requiring new or extended District mains who filed an application for a building permit with the Santa Barbara County or City Building Department on or before December 7, 1972, shall be entitled to proceed with the construction and installation of said water service facilities, and to have water service supplied therethrough, provided that all of the following conditions are also satisfied:

(1) The Applicant applies and pays all fees and charges and performs all other things required by the District's rules and regulations for said new water

service facilities, within 120 days from December 7, 1972, and;

(2) The Applicant obtains the issuance of a building permit pursuant to said building permit application, and thereafter constructs a building pursuant to the terms of said building permit.

SECTION 4. PROVISIONS FOR NEW FACILITIES FOR IRRIGATION PURPOSES.

The Board of Directors may in its discretion upon written application made within 120 days from December 7, 1972, permit any applicant for new water service facilities primarily for irrigation purposes to install such new water service facilities and to receive water service therethrough provided that on or before December 7, 1972, said applicant actually, bonafidely and significantly commenced the construction or installation of an irrigation system or other improvements or facilities reasonably necessary for agricultural uses, to the extent and subject to such terms and conditions as the Board in its discretion deems reasonable.

SECTION 5. MASTER METERS.

No new service connections shall be permitted to be made to any master meter, or any water facilities or lines served through a master meter, serving two or more dwellings, commercial, industrial, recreational, institutional or educational units, structures, or parcels, after December 7, 1972, unless the water consumer applies to the Board of Directors for such connections, within 120 days from December 7, 1972, and the Board of Directors finds, in its discretion, that the Applicant has actually, bonafidely and significantly commenced the construction or installation of water service facilities to be connected to such master meter, or other improvements or substan-

tial activities in preparation therefor, equivalent to those set forth in Sections 2, 3 or 4.

SECTION 6. FIRE HYDRANTS, MAINS AND LINES.

Notwithstanding any other provision of this Ordinance, no restriction or prohibition is imposed upon applicants, approvals or installations solely for fire hydrants, fire mains or fire lines for fire protection reasons, and which do not require any other new water service facilities prohibited hereby.

SECTION 7. TEMPORARY SERVICE.

(a) CONSTRUCTION WORKS

Notwithstanding any other provisions of this Ordinance, no restriction or prohibition is imposed upon applications, approvals or installations of water service facilities solely for temporary service to those construction works which are entitled to permanent water service facilities under the terms of this Ordinance.

(b) OTHER TEMPORARY SERVICE

Notwithstanding any other provisions of this Ordinance, no temporary water service facilities shall be approved or installed for circuses, bazaars, fairs, temporary restaurants, or other temporary uses, except upon written application to the Board of Directors which may, in its discretion, allow such use if it finds that the quantity of water to be consumed by such temporary use will not significantly adversely affect water supply or service to other existing water consumers.

SECTION 8. REPLACEMENT AND REPAIR OF EXISTING FACILITIES.

Notwithstanding any other provisions of this Ordinance, no restriction or prohibition is imposed upon the repair of existing water service facilities or the replacement of existing water service facilities with new water service facilities of the same type, size and capacity.

SECTION 9. RESTRICTION ON SERVICE THROUGH EXISTING INACTIVE FACILITIES.

Water service shall not be provided through any existing, installed water service facilities which were not used for furnishing any significant quantity of water for any bonafide purpose at any time within five years prior to December 7, 1972, unless an applicant for water service through said facilities has satisfied the conditions of Sections 2, 3, 4 or 5 of this Ordinance.

SECTION 10. CONTINUED PROCESSING OF APPLICATIONS.

Notwithstanding any other provision in this Ordinance, District staff shall continue to process applications for new water service facilities prohibited hereby, collect the ordinary fees and charges and conduct the necessary reviews of plans, and render advise and assistance to applicants, and place such applications in a priority sequence for later Board action; provided that staff shall not approve any such applications or plans, shall not fix or accept any bonds or guarantees, and shall not inspect any water facilites nor collect any inspection fees, and shall not refer any proposals for main extensions outside of dedicated rights of way to the Board of Directors for approval.

In filing his application and paying fees pursuant to any authority under this Section, the applicant will be required to acknowledge in writing that the acts of staff described herein do not constitute an acceptance or approval of such water service facilities and that the applicant acts at his own cost, expense and risk of loss, and agrees to and does waive and release any claim or demand against the District, its officers, directors, employees, and agents for any such cost, expense, loss or damage resulting from the refusal to accept, approve or serve water through said facilities, and waive and release any claim of right to have said facilities finally accepted, approved, connected or supplied water therethrough by reason of such processing activities.

When and if the Board of Directors declares that the water shortage emergency has ceased, unless directed otherwise by the Board of Directors, staff will thereafter finalize the processing of any previously filed applications in the order of priority previously established.

SECTION 11. REQUIREMENT FOR INFORMATION.

Applicants for new water service facilities shall be responsible for providing all information and proof requested by the Board of Directors of District staff for use in processing, verifying or enforcing any matter provided for herein, and the applicants shall do so at their sole cost and expense. Any failure to provide requested information or proof shall be grounds for denial of any application or relief.

SECTION 12. FUTURE RESTRICTIONS.

All applicants for water service facilities are hereby put on notice that further restrictions or prohibitions on water use and service may hereafter become necessary,

and nothing herein, and no application, permit or approval of any water service or water service facilities granted pursuant to these rules shall vest in the applicant any right to a particular use or quantity of water, but such applicant shall be subject to all further prohibitions, restrictions, rules and regulations in the same manner and extent as any other consumer or class of consumers similarly situated existing at the time such prohibitions or restrictions are imposed.

SECTION 13. APPEAL AND EXCEPTIONS BY PERMIT.

(a) APPEALS. Any applicant for water service facilities may appeal any decision or application of the provisions of this Ordinance by District staff, to the Board of Directors by filing a written appeal with the District Secretary within 10 days from the date of the decision or application appealed from, and the Board of Directors shall set the matter for hearing at a regular or special meeting within 30 days from the date the request for review is filed, and may in its discretion thereafter affirm, reverse or modify the staff's decision, and impose any conditions it deems just and proper, if it finds the decision to be erroneous or that the applicant would suffer undue hardship or emergency as a result thereof.

(b) EXCEPTIONS BY PERMIT. The Board of Directors of the Goleta County Water District may in its discretion grant permits for water service facilities otherwise prohibited hereby, if it finds and determines that (1) the restrictions herein would cause an undue hardship or emergency condition or (2) that the granting of the permit will not adversely affect the water supply or service to other existing water consumers or (3) that due to peculiar facts and circumstances, none of the provisions of this Ordinance authorizing new water service

facilities are applicable to the situation under consideration, if the Board of Directors in its discretion finds that the applicant is entitled to substantially similar treatment as set forth in some provision of this Ordinance authorizing new water service facilities. Such permits may be granted only upon application in writing therefore, after public hearing, notice of which is published once at least five (5) days prior to such hearing, in a newspaper of general circulation within the District, except that the Board of Directors may in its discretion dispense with the writing, public hearing, and publication requirements if it finds that an emergency condition requiring immediate action exists. Upon granting any such permit, the Board of Directors may impose any conditions it determines to be just and proper. Said permit shall be prepared in writing, the original to be kept on file with the District and a copy to be furnished to the applicant.

SECTION 14. PENALTIES.

(a) It shall be a misdemeanor for any person, firm, association, partnership or corporation to use or apply water received from this District contrary to or in violation of any restriction or prohibition contained in this Ordinance, and upon conviction thereof such person, firm, association, partnership or corporation shall be punished by being imprisoned in the County Jail for not more than 30 days or by fine of not more than Three Hundred ($300.00) Dollars, or by both such fine and imprisonment, for each violation and for each day of a continuing violation.

(b) Any person, firm, association, partnership or corporation willfully violating any restriction or prohibition of this Ordinance shall be subject to having water service

discontinued to the affected property, after having been given reasonable notice and an opportunity to be heard to protest against the findings of such willful violation and the discontinuance of service.

SECTION 15. DEFINITIONS.

The terms applicant and consumer used herein shall apply to every person, firm, partnership, association, corporation, city, county, state or local agency, political subdivision, district, or entity of every kind.

SECTION 16. REPEALER OF PRIOR ORDINANCE.

Goleta County Water District Ordinance 72-1, adopted December 7, 1972, is hereby revoked and rescinded.

SECTION 17. SEVERABILITY.

If any section, sub-section, sentence-clause or phrase of this Ordinance is for any reason held to be unconstitutional or invalid such decision shall not affect the validity of the remaining portions of this Ordinance. The Board of Directors hereby declares that it would have passed this Ordinance and each section, sub-section, sentence, clause or phrase thereof irrespective of the fact that any one or more sections, sub-sections, sentences, clauses or phrases be unconstitutional or invalid.

Vote on the Ordinance by roll call vote resulted as follows:

AYES:	Harry G. Iddings, Jr. Dee Pagliotti Llana H. Sherman Max L. Feldman
NAYS:	None
ABSENT:	Jose R. Martinez

DATED: December 21, 1972

APPROVED:

MAX L. FELDMAN, President

ATTEST:

(SEAL)

ROSINA C. PETERSON, Secretary

APPENDIX G

FULL TEXT OF "THE RESPONSIBLE WATER POLICY ORDINANCE" PREAMBLE

The people of the Goleta County Water District, County of Santa Barbara, State of California, do ordain and enact the following ordinance; which shall be called "The Responsible Water Policy Ordinance", and whose objectives are:

(1) To cause the Goleta County Water Board to adopt policies which conserve local water resources;

(2) To cause the Goleta County Water Board to cancel and rescind any contract, commitment or policy leading to the importation of water until such time as the voters shall have approved the financing thereof; and

(3) To cause the appropriate governing bodies to give the voters of the Goleta County Water District an early opportunity to approve or disapprove the financing of alternative new sources of water, including, but not limited to, importation of water from outside the County of Santa Barbara.

PROVISIONS

A. Definitions

1. The definition of a word applies to any of its variants.

2. "District" means the Goleta County Water District, County of Santa Barbara, State of California.

3. "Board" means the Board of Directors of the Goleta County Water District.

4. "Works" includes but is not limited to water works, conduits, reservoirs, storage sites, watersheds, machinery, wells, pumps, dams, storage tanks, tunnels, hydrants, meters, works and facilities for the transportation of water, other appliances and their appurtenances needed thereby.

5. "Conduit" shall include canals, channels, pipes, ditches, flumes and any other means by which water flows or is conveyed from one point to another.

6. "Water originating from sources outside the County of Santa Barbara" shall include all surface and subterranean water which flows or is conveyed by conduits and works, or any combination thereof, from a point outside the boundaries of the County of Santa Barbara to a point inside said County except such water situated in the watershed of the Santa Ynez River, and its tributaries in the State of California, which flow naturally from a point outside the County of Santa Barbara to a point inside said County.

7. "California State Water Plan" shall include that system for conveying water from Northern and Central California to Southern California as implemented by the Burns-Porter Act, Cal. Stat. 1959, Ch. 1762.

8. "Safe annual yield" is the amount of water that can be withdrawn from the groundwater basin within the Goleta County Water District without exceeding the aveage annual replenishment of such water.

9. "Cachuma Project" consists of the Cachuma Dam and reservoir on the Santa Ynez River, the Tecolote Trans-Mountain Diversion Tunnel and the South Coast Conduit built under provisions of a master contract between the Santa Barbara County Water Agency and the

United States acting by and through the Bureau of Reclamation of the Department of the Interior.

B. Conservation of Water.

Unless and until the voters of the District have voted affirmatively to assume and pay for any and all costs to be incurred by the District or its inhabitants by reason of:

(a) The importation and distribution of water from sources outside the County of Santa Barbara; or

(b) The development and distribution of water from specific sources other than from the groundwater basin within the district or from the District's annual allotment from the Cachuma Project;

the Board shall not purchase, use, acquire or distribute an amount of water which shall exceed the combined total of (a) the District's total annual allotment from the Cachuma Project; and (b) the safe annual yield from the groundwater basin within the boundaries of the District.

C. Approval of Specific Sources.

The Board shall immediately take all steps necessary to explore the feasibility and ascertain the cost of any and all sources of water not currently being used by the District and shall make such information available to the voters of the District at the earliest available time.

Any proposal submitted to the voters for the purposes of authorizing the Board to develop, use, acquire, or purchase additional sources of water shall accurately state immediate and long term costs to be incurred in connection with the implementation of such a proposal.

D. Importation of Water.

Unless and until such time that the voters of the District shall have voted affirmatively to pay any and all costs incurred by the District to import water originating from sources outside the County of Santa Barbara:

(1) The District shall not acquire, use, purchase or distribute water originating from sources outside the County of Santa Barbara including, but not limited to, water delivered in whole or part through conduits which are part of the California State Water Plan;

(2) The Board shall cancel, annul and rescind any contract, declaration, resolution, policy statement or any other action wherein the Board has expressed its approval of, or commitment to, the acquisition, use, purchase or distribution of water originating from sources outside the County of Santa Barbara, including, but not limited to, water delivered in whole or part through conduits which are part of the California State Water Plan.

E. Emergency Water Restrictions.

During any emergency caused by drought, or other threatened or existing water shortage, the Board shall promptly:

(1) Deny applications for new or additional service connections which are not in existence at the time the emergency is deemed to exist;

(2) Not annex any land to the District; and

(3) Exercise all powers granted to the Board under the provisions of the California Water Code.

F. Special Election.

This initiative ordinance shall be submitted immediately to the voters of the District at a special election called for that purpose.

G. Liberal Construction.

This ordinance shall be liberally construed to effect the purposes and objects thereof.

H. Severability.

Should any portion of this initiative ordinance be declared invalid for any reason whatsoever by and Court having jurisdiction, the invalidity of such portion shall not be deemed to invalidate any remaining portion of this initiative, and each provision and clause shall be construed as an independent provision and shall not depend for its legality or effect on the portion invalidated.

I. Reservation of Water Rights.

This ordinance shall not be deemed to affect any rights which the District or its residents may have to any funds collected for the purpose of reserving rights to the importation of water originating from sources outside the County of Santa Barbara.

J. Effective Date. This ordinance shall be effective immediately.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 9, 1986, I served the within Petition for Writ of Certiorari in re: "Goleta Water District v. A. Frank McMillan in the United States Supreme Court, October Term, 1986, No. .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Ronald A. Zumbrun
Robert K. Best
Thomas W. Birmingham
Pacific Legal Foundation
555 Capital Mall, Suite 350
Sacramento, CA 95814
Attorneys for Respondent

A. Frank McMillan
Gladys Bottroff McMillan
2361 Broadmoor
Plam Springs, CA 92264
"Respondents Service Requested by Attorneys for Respondent"

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 9, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-985

In The
Supreme Court of the United States
October Term, 1986

GOLETA WATER DISTRICT, *et al.*,
Petitioners,

v.

A. FRANK McMILLAN and
GLADYS BOTTROFF McMILLAN,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Respondents, A. Frank McMillan and Gladys Bottroff McMillan, owned a residence supplied with domestic water by the Goleta Water District. In 1967 after the McMillans had demolished the existing residence to prepare for construction of new units on the property, the district turned off the water but left all service facilities, including the

meter in place. The record of this case does not reveal why the water was turned off or who requested that action. Petition Appendix (Pet. App.) C2. The McMillans did not proceed immediately with the construction of the new units and the lot remains vacant today.

In December, 1972, the water district enacted Ordinance No. 72-2 which imposed a moratorium on "new, additional, further, expanded or increase-in-size water service connections." Pet. App. F1. The ordinance also prohibited the provision of water "through any existing, installed water service facilities which were not used for furnishing any significant quantity of water for any bonafide [*sic*] purpose at any time within five years prior to December 7, 1972." Pet. App. F6. It was recognized by the courts below that this prohibition on water " 'through any existing, installed water service facilities' " applied to the McMillans, who were not covered by the prohibition on "new water connections." Pet. App. A2-3. Ordinance No. 72-2 allowed the board of directors of the water district to continue "in its discretion" to grant water service connections either on an appeal of a staff denial or as an exception to the moratorium. Pet. App. F8.

In May, 1973,[1] the water district adopted "The Responsible Water Policy Ordinance" (Policy Ordinance) which also prohibited "new or additional service connections" under certain specific conditions. Pet. App. G4. On September 15, 1982, the McMillans applied to have the water turned back on using a form provided by the water

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[1] The reference by the Court of Appeals to 1983 as the date of this ordinance (792 F.2d at 1455, Pet. App. A3) is an error.

district entitled: "APPLICATION FOR EXCEPTION TO ORDINANCE 72-2." Pet. App. A3. The water district charged the McMillans a $200 fee to accept and process this application. The board of directors conducted a hearing and denied the request for exception. *Id.* The McMillans requested reconsideration. The water district's general manager requested and received additional information from the McMillans and then denied reconsideration on November 12, 1982. This case was filed May 2, 1983. *Id.*

The McMillans could not afford counsel and proceeded as pro se litigants. Pet. App. D1. The District Court summarily dismissed their complaint. Pet. App. E1, but the McMillans, still proceeding pro se, obtained a reversal from the United States Court of Appeals for the Ninth Circuit allowing them leave to amend their complaint. Pet. App. B1-4. After the filing of the amended complaint, the District Court granted summary judgment to the water district on two claims and dismissed the third. Summary judgment was granted on the inverse condemnation claim on the basis that it was time barred because "[a]s early as 1973 or 1974 plaintiffs knew or should have known that their rights to continued water service had been interrupted by the District on other than a temporary basis." Pet. App. C10. The District Court dismissed the federal substantive due process claim on the basis that the court lacked "subject-matter jurisdiction" because a state court had already ruled that no damages could be recovered on such a claim under California state law and that the proper remedy was a proceeding in mandamus which would be

"inappropriate for this court to take up." Pet. App. C14-16. Summary judgment was granted on the equal protection claim because the court concluded that the McMillans in their opposition to the summary judgment motion had "not presented any evidence that their treatment by the District was motivated by anything other than a rational interest in upholding the moratorium." Pet. App. C17.

The Court of Appeals affirmed the summary judgment on the equal protection claim, reversed on the other two claims, and remanded the case to the trial court for further proceedings. Pet. App. A13. On appeal the water district had raised the question of abstention. Although a brief mention of abstention appeared in the water district's summary judgment papers, no motion to abstain was ever submitted for consideration by the District Court. The Court of Appeals rejected the water district's request that the appellate court direct the District Court to abstain. The Court of Appeals left the question of abstention to the trial court's discretion on remand. Pet. App. A10-13.

———o———

SUMMARY OF ARGUMENT

The petition raises no important question of federal law which has not been decided by this Court or which conflicts with applicable decisions of this Court. Since the Court of Appeals remanded the case to the District Court there is no final judgment against the petitioner water district for this Court to review. The questions of federal law raised in the petition are either open for decision by the District Court on remand or raise factual

issues which have not been decided by the courts below and will be considered by the District Court on remand.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS IS NOT RIPE FOR REVIEW BY THIS COURT

In the Court of Appeals this case was "REMANDED for further proceedings consistent with this opinion." Pet. App. A13. Therefore, no final judgment has been entered against the water district.

> "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967).

The District Court ruled on three separate claims, granting summary judgment for defendant water district on plaintiffs' claims for inverse condemnation and violation of their rights to equal protection and dismissing plaintiffs' claim for violation of their rights to substantive due process. Pet. App. C1, C17. The Court of Appeals affirmed the summary judgment for the water district on the equal protection claim and reversed on the substantive due process and taking claims. Pet. App. A13. Therefore, the only portion of the opinion of the Court of Appeals which even rises to the level of possible law of the case is the ruling in favor of the water district on the equal

protection claim. No challenge to this ruling is raised by the petition. On the claims which are the subject of the petition, the water district is merely objecting to the prospect of going to trial.

> "As has been many times declared, this [certiorari] is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (citations omitted).

This is not an extraordinary case.

Exercising certiorari jurisdiction at this point in this case would be inconsistent with "the long-established policy against piecemeal appeals." *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978). The effect of the opinion of the Court of Appeals is to put the water district into a status in this litigation no different from any litigant who has had a motion for summary judgment denied. The denial of a summary judgment is not even an appealable order. It "does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Switzerland Cheese Association v. Horne's Market*, 385 U.S. 23, 25 (1966).

In its "point two" in the petition, the water district merely quibbles with the Ninth Circuit's interpretation of the District Court's ruling on a factual determination. This Court is requested to intercede to provide guidance as to what the District Court meant when it used the

phrase, "identical constitutional challenge." Pet. 19; Pet. App. C14. Obviously this question is easily resolved by the District Court itself on remand.

In its "point three" the water district appears to be asking this Court to determine that the District Court had in fact abstained from the exercise of jurisdiction. Obviously a court which grants summary judgment on two claims and dismisses a third has not abstained from the exercise of its jurisdiction. In reviewing the abstention question the Court of Appeals applied the abuse of discretion standard. Pet. App. A13. The decisions of this Court have clearly indicated that this is the appropriate standard for reviewing a trial court decision not to abstain. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984). Since the Court of Appeals applied the correct standard of review, whether or not it reached the most appropriate result, the issue does not merit review by this Court at this time. The water district is free to argue again to the District Court that it should abstain. Only the water district's "point one" merits further discussion.

II

FACTUAL MATTERS LEFT UNDECIDED BY THE COURTS BELOW CONTROL THE QUESTION PRESENTED ON THE APPLICATION OF THIS COURT'S DECISION IN WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION v. HAMILTON BANK OF JOHNSON CITY

The only contention raised in the petition which is related to an important question of federal law is the argument that the Court of Appeals did not properly apply this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. —, 105 S. Ct. 3108 (1985). The question presented

is based on the assertion that "the facts [of this case] make the request for a final decision futile because the outcome is definite and cetain [*sic*] against the applicant." Pet. i. Essentially the water district asserts that after adoption of the Policy Ordinance in 1973, it "had no option to give any variance or to grant any request." Pet. 14. This statement cannot be reconciled with the facts. Long after the Policy Ordinance was adopted, the district routinely provided applicants with a standard form on which to request an exception to the moratorium. These exception applications were accepted by the water district and processed through a hearing before the board of directors. The district even charged and accepted a $200 fee to consider an application. The board of directors purported to act on each exception application under the exception provision of Section 13(b) of Ordinance No. 72-2. Pet. App. F8-9. The McMillans are only one of many who went through this process before the water district. In a document filed by the McMillans in the District Court the water district stated:

> "The number of new meters installed since 1972 (1973 through 1982) is 504. The number of new meters installed under exception procedures (included in above number) since 1972 is 35." Exhibit No. 13 to Plaintiffs Opposition to Motion for Summary Judgment at 6; Excerpt of Record in Court of Appeals, Tab 31, Exhibit No. 13 at 6.

Moreover, in the current status of the case the factual question of whether the Policy Ordinance would apply to the McMillans has not been resolved. The Court of Appeals recognized that the key factual question of " 'whether [the McMillans] were actual (or "constructive") users and not merely potential users' " had not been resolved.

Pet. App. A6-7. "Yet here the district court did not determine whether the McMillans were actual water users, as they contended, or whether they were merely potential users." Pet. App. A9. The Policy Ordinance which the water district now claims left it "no option to give any variance or to grant any request," Pet. 14, by its terms only applies to "applications for new or additional service connections." Pet. App. G4. If the McMillans are found on the facts of this case to be actual users with an existing service connection the ordinance will not apply.

There is a substantial possibility that the McMillans will prevail on this point in the trial court. It is not disputed that the McMillans' property had been receiving water from the district and that the water service connection from the water main to the property including an operable water meter was in place. Pet. 5. The water was turned off only because McMillans started a project to rebuild the residential structures on the lot. *Id.* Not until 1983 after the McMillans' application to turn on the water had been denied did the district remove the water meter and take the McMillans off of "active status" on the district's books. *Id.* On these facts, neither of the two ordinances necessarily precludes turning on the McMillans' water.

Ordinance No. 72-2 contains two separate provisions which give the board of directors discretion to approve water service in spite of any prohibitions in that ordinance. Section 13(a) allows the board "in its discretion" to reverse any decision by the staff not to allow water. Section 13(b) allows the board "in its discretion" to grant exceptions to the ordinance for various reasons, including

"undue hardship" and no adverse effect on other water consumers. Pet. App. F8. The McMillans could qualify under either provision.

The Policy Ordinance does not say that it rescinds or supersedes Ordinance No. 72-2. By its terms it applies only to "new or additional service connections." Pet. App. G4. The McMillans, however, had a service connection. It just wasn't turned on. The Court of Appeals recognized that the water district itself considered the McMillans to have an existing water service. The water district applied to them Section 9 of Ordinance No. 72-2 which applies only to "existing inactive facilities." Pet. App. A2-3, F6. The McMillans' application to restore water service was submitted on the standard form provided by the district entitled: "APPLICATION FOR EXCEPTION TO ORDINANCE 72-2." The application was processed and denied on the basis of Ordinance No. 72-2. When the water district accepted the McMillans' application and charged them a $200 application fee, it was not suggested that the application was "futile" and a total waste of their time and money because the Policy Ordinance prohibited any water service. If the water district itself believed that it had power to grant exceptions under Ordinance No. 72-2 it can hardly be fairly said that the McMillans should have known that such an application would be futile.

The district's belated legal argument is that the effect of the adoption of the Policy Ordinance was to create an immediate cause of action in the McMillans and the other "thousands of people in the Goleta Water District who want water but cannot get it." Pet. 13. Whether or not

this legal argument has merit, it cannot be addressed until it is determined from the facts of the case whether the McMillans' application requested "new or additional service connections." Pet. App. G4. Until the factual questions are resolved by the courts below, the question presented in the petition concerning the proper application of this Court's decision in *Williamson County* is not ripe for review.

———o———

CONCLUSION

The petition for writ of certiorari should be denied.

DATED: January, 1987.

Respectfully submitted,

Of Counsel

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